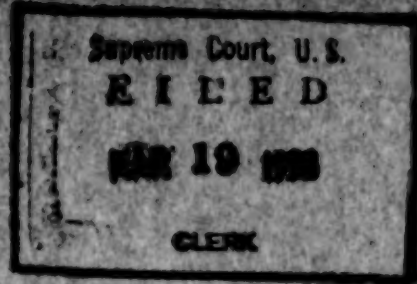


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No. 97-634

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1997

**PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,
v.
RONALD R. YESKEY,
Respondent.**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

**BRIEF AMICI CURIAE OF
ADAPT, PENNSYLVANIA COALITION OF
CITIZENS WITH DISABILITIES and DISABLED IN
ACTION OF PENNSYLVANIA IN SUPPORT OF
RESPONDENT**

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AMICI CURIAE BRIEF OF
ADAPT, PENNSYLVANIA COALITION OF CITIZENS
WITH DISABILITIES and DISABLED IN ACTION OF
PENNSYLVANIA IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

Amici are three organizations, one national and two in Pennsylvania, composed primarily of persons with physical and mental disabilities, including persons with spina bifida, cerebral palsy, muscular dystrophy, spinal cord injuries, multiple sclerosis, quadriplegia, paraplegia, head and brain injuries, polio, amyotrophic lateral sclerosis, persons with sensory disabilities, including persons

Pursuant to 37.6 of the Supreme Court rules, none of the parties authored this brief in whole or in part and no one other than the amici or counsel contributed money or services to the preparation and submission of this brief.

who are blind or Deaf, and persons with cognitive and developmental disabilities. Many of these persons use assistive devices, including motorized and manual wheelchairs, white canes, ventilators, communication devices and personal assistance services for meeting their personal hygiene needs and transferring from bed to wheelchair.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* It was the plaintiff in the case ADAPT v. Skinner, U.S. Department of Transportation, 867 F.2d 1471, 881 F.2d 1184 (3d Cir. 1989) and filed an amici curiae brief in Vacco, et al. v. Quill, et al., 117 S.Ct 2293 (1997).¹

PENNSYLVANIA COALITION OF CITIZENS WITH DISABILITIES ("PCCD"), a statewide organization, is a consumer-controlled organization governed and staffed by individuals with

¹ All parties have consented in writing to filing of this brief. Copies of the written consents are on file with the Clerk of the Supreme Court.

diverse disabilities. PCCD's primary mission is to advocate for the civil rights of and governmental services for people with physical, sensory and mental disabilities, including prisoners in Pennsylvania who have disabilities.

DISABLED IN ACTION OF PENNSYLVANIA ("DIA") is an organization celebrating its twenty-fifth year of advocating for the civil rights of all persons with disabilities, including Pennsylvanians who are in nursing homes, prisons, and other institutions. DIA is comprised of people with physical and mental disabilities and has been the lead plaintiff in a number of lawsuits to increase accessibility to people with disabilities. *See, e.g. DIA v. Sykes*, 833 F.2d 1113 (3d Cir. 1987), *cert. denied*, 108 S.Ct 1293 (1988), *DIA v. Pierce*, 606 F.Supp. 310 (E.D. Pa. 1985), *aff'd* 789 F.2d 1016 (3d Cir. 1985).

SUMMARY OF ARGUMENT AND INTRODUCTION

Persons with disabilities face a complex maze of discrimination in the free world. Prisoners with disabilities face even harsher forms of discrimination in closed institutions and, without the protections of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, they will have no redress for and protection from the pernicious effects of discriminatory policies and practices.

As we will show, inmates with disabilities are all too often excluded from regular prison programs and services and, in addition, are subjected to inexcusable indignities, intentional discrimination, harassment and abuse, because of their disabilities.

All prisoners are relatively powerless. Amici ask only that prisoners with disabilities not be made more powerless or prone to mistreatment because of their disabilities. The ADA was intended to prevent discrimination against disabled people regardless of their location in our society. Of course, the situs of the differential treatment is important with respect to the state's duty to afford reasonable accommodations, and the treatment of disabled persons in prison must take into account issues of security, cost, and relevant administrative burdens.

In this Amicus Brief, we make two fundamental points. First, there is at the present time substantial evidence of ongoing, systemic and at times life and health threatening discrimination against persons with disabilities in the nation's prisons and jails. The ADA was intended to apply to all institutions in which disabled persons found themselves subject to discrimination based on their disabilities.

Second, the ADA requires only *reasonable* accommodations and modifications of existing policies and practices, not changes that might cause undue administrative and financial burdens. Petitioner and other States attempt to persuade the Court that compliance with the ADA will cause grave havoc in the prisons, but there presently exist numerous examples of reasonable accommodations and modifications of prison policies and practices that comply with the ADA, demonstrating that prison accommodations can be readily implemented and discrimination against people with disabilities eliminated.

The states have not and will not face great difficulties in adhering to the relevant ADA's standards. Only where there is proven discrimination based on disabilities and only where a "reasonable accommodation" can be provided is the state required to redress the effects of the discrimination. Of course, where the discriminatory conduct is manifested in abuse or a failure to protect, there can be no penological justification and the ADA rightfully demands a cessation of such treatment. The history of the application of the ADA to prisons demonstrates that reasonable accommodations are often easily made and that the law does not undermine legitimate security or prison administrative concerns.

Adjustments to prison programs and policies have been made by prison administrators with no proof of adverse effects on prison management.

ARGUMENT

I. Prisoners with Disabilities, Because They are Disabled, Are Intentionally Discriminated Against, Sometimes Abused and Hated, and, Are Denied And Excluded From Prison Services, Programs And Activities Nondisabled Prisoners Routinely Receive From Departments of Corrections

The ADA is the federal *civil rights* statute for people with disabilities. Congress recognized that people with disabilities were discriminated against in institutions, including prisons, jails, mental hospitals and nursing homes. 42 U.S.C. § 12101(a)(3). To prevent and remedy such discrimination, Congress mandated that no person with a disability, "by reason of such disability," shall be: (a) "excluded from participation in ...", or (b) "denied the benefits of the services, programs or activities," or (c) "subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphases added).² Eliminating discrimination against people with disabilities in prisons requires that disabled inmates be treated equally with

² It is important to note that Congress recognized that being "subjected to discrimination" is a distinct prohibition, separate from being excluded from participation or denied the benefits of a public entities' services, programs or activities. Many of the examples in the text, *infra*, demonstrate how prisoners are subjected to the discrimination of abuse and hatred "by reason of [their] disability."

nondisabled prisoners: their disabilities not be an excuse for segregating them from nondisabled prisoners; they have the same opportunities as nondisabled prisoners to work, recreation, education, sanitation, dining, and health care; and their lives not be perceived or treated as less valuable than nondisabled prisoners.

This Court should hear how prisoners with disabilities are treated by virtue of their disabilities. By hearing their stories, one can better understand why Congress intended to end discrimination against people with disabilities in every institution.

● J. Scottie Harrelson is a paraplegic who was denied the use of his wheelchair and forced to crawl around the cell. Harrelson v. Elmore County, Ala., 859 F.Supp. 1465, 1466 (M.D. Ala. 1994).

● Cleo Love, a quadriplegic who uses a wheelchair, was excluded, because he was disabled, from the prison's group substance abuse program, transition program, commissary, outside recreation, a prison job, and access to education and its law library. "Documentary evidence supports the conclusion that the discrimination had to be intentional...." Mr. Love requested access to school... for six years.... [The prisons's ADA Coordinator wrote] that Mr. Love and others were 'excluded from some programs and

services simply because of where they are housed and based only on their limitations'." Love v. McBride, 896 F.Supp. 808, 809-10 (N.D. Ind. 1995)(emphasis added), aff'd sub nom. Love v. Westville Correctional Center, 103 F.3d 558, 559 (7th Cir. 1996)(Plaintiff was denied use of "the prison's recreational facilities, its dining hall, the visitation facilities that were open to the general population, and ...was unable to participate in substance abuse, education, church, work or transition programs available to members of the general inmate population.")

● **Pete Grassia**, a paraplegic (T-12), used a wheelchair for mobility. A guard taunted Grassia over the loudspeaker so that everyone up and down the cellblock could hear: "Hey Grassia! Did you [defecate] in your pants yet? Need a new diaper, cripple?" Jay Mathews, Under a New Law, A Rising Sensitivity to Disabled Inmates? The Washington Post, Nov. 24, 1993, at A4. "Grassia said, he has been denied catheters, access to showers when he loses rectal control and water needed to keep bedsores from becoming infected. He also said he was left on the floor for several hours when he fell trying to use the toilet....[D]isabled inmates insist they are mistreated precisely because they cannot move as fast as [nondisabled] prisoners." Id. Peter Grassia has difficulty obtaining leg bags and

catheters, which should be changed every day. Because he was denied catheters, he had to "tape them when they leak, wash out the bags and reuse them as well. Anyone familiar with sanitary cath[eter] procedures knows the serious danger of sepsis such a practice courts." Jean Stewart, Inside Abuse: Disability and Oppression Behind Bars, The Disability Rag & Resource, Nov.-Dec. 1994 at 6.

● **Grant H. Hendrick**, a nondisabled prisoner, was engaged to **Linda Gail Niece** who was Deaf. She could not communicate with Hendrick over the telephone without a Telecommunications Device for the Deaf (TDD), a device with a keyboard and screen that easily hooks up to a telephone, permitting persons to type and receive messages over the screen. Ms. Niece purchased a TDD to donate to the prison so she could communicate with Mr. Hendrick. The prison "flatly refused to accept the TDD or provide Plaintiff with access to a TDD...." Niece v. Fitzner, 922 F.Supp. 1208, 1212 (E.D. Mich. 1996).

● **Gloria Johnson** had multiple sclerosis, a degenerative neurological condition. As her MS progressed, she had no use of her legs or arms, was blind and used a wheelchair for mobility. In her file, officials wrote "Do not overly coddle - perhaps

deliberately 'delay' calls for bedpan to assess self-function.... 'The nurses wouldn't do anything for me,' she said. 'They wouldn't help me eat. From Sunday evening at 8 p.m. to Tuesday at 2:30 p.m. I didn't use the bathroom at all.... One night I had to go to the bathroom, so I fell out of bed and tried to drag myself to the bathroom. I didn't make it.'" Nina Siegal, Death Behind Bars, San Francisco Bay Guardian, Feb. 5, 1997, at 16.

● Larry Noland is a semi-quadruplegic as a result of a broken neck. He cannot use his legs, has limited use of his left hand, and can use his right hand. He has no bladder, and he uses a colostomy and urostomy bag to remove body waste. He requires soap and water to clean his hands when he cleans or changes the bags. Mr. Noland was put in a cell without a bed, no running water, only an open drain in the floor for disposal of bodily waste.

"Even after a physician prescribed more water to keep Mr. Noland's system functioning properly, the defendants denied him a sufficient quantity of water. [Defendant] refused to bring Mr. Noland water when he requested it. The physician prescribed sixty-four ounces of water for Mr. Noland per shift, but Mr. Noland often received less than eight ounces each day.

"Initially, Mr. Noland was not allowed to shower as other inmates were, but could only sponge bathe himself every other day.... His showering time was limited to thirty minutes despite his difficulties

washing himself with only one arm. Mr. Noland had to dress and undress on the shower floor....

"When Mr. Noland spilled or got materials from one of his bags on his hands, he often had to wait as long as twenty-four hours to wash it off. As a result, he had to eat many meals with the human waste still on his hands.

"[When] Mr. Noland was moved to a regular cell ..., [he] could not sleep in the bed provided because his wheelchair did not fit through the door to the bed....

"Mr. Noland's wheelchair once had a flat tire. When approached, [defendant] forced Mr. Noland to get out of the wheelchair and crawl back to his cell to have the tire repaired. On another occasion, [defendant] refused to allow Mr. Noland to wash his hands although Mr. Noland had feces on his hands, explaining that it was not Mr. Noland's bath day. Mr. Noland had to wait until his bath day to wash the feces off his hands.

"[D]efendants forced Mr. Noland to sit in his wheelchair for nearly thirteen hours despite having been advised that two hours was the prescribed limit that Mr. Noland could sit in his wheelchair. Although Mr. Noland asked to be moved several times, he was told to wait. Pressure on a paralyzed individual's skin for more than two hours is a common cause of pressure sores. As a result, Mr. Noland's new skin graft was destroyed and his pressure sore reopened."

Noland v. Wheatley, 835 F.Supp. 476, 480-81 (N.D. Ind. 1993).

● Winfried Rhodes is blind. "Because of his blindness, he is required to eat all of his meals in his cell and is prohibited access to the dining hall, gym, vocational shops, and

educational facilities.... He is frequently subjected to psychological abuse by guards who sneak up behind him to frighten him, place tape across the doorway of his cell, and move the furniture around in his cell.⁴ Jean Stewart, Life, Death, and Disability Behind Bars, New Mobility, June 1998 (forthcoming).

● Easton Beckford has paraplegia and uses a wheelchair for mobility. The prison's sinks have push-button faucets difficult to operate from a wheelchair. "Easton Beckford ... said in an affidavit that he has to collect water by using a makeshift stopper and then lifting it in his hands to his body, causing some to spill on the floor. Several times [Beckford] has been given a 'deprivation order' for spilling waters, which means 'they turn the cell water on for only 15 minutes each day,' he said. 'That is my only opportunity to drink water, brush my teeth, clean myself and flush the toilet'. " Jay Mathews, Under A New Law, *supra*. In 1994, "[Beckford's] wheelchair was taken away from him for months on end, rendering him unable to move from his bed. Both sink and toilet in his cell were inaccessible; Easton frequently soiled himself. As punishment for his complaints about lack of access, he's been denied permission to take showers in the shower room." Jean Stewart, Life, Death and Disability Behind Bars, *supra*.

● A Houston District Court stated that the

"straitened circumstances under which these inmates live are contrary to reason and common sense. Physically handicapped inmates must either manage as best they can, with virtually no special assistance, in physical environments which pose extreme difficulties for them, or spend their days vegetating, denied access to virtually all the programs and activities available to non-disabled inmates.... In short, [the Department of Corrections] provides essentially no accommodations for handicapped inmates which would enable them more effectively to function and contend with their desperately onerous situations in prison."

Ruiz v. Estelle, 503 F.Supp. 1265, 1340 (S.D. Tex. 1980).³

● Patty Contreras, who was five feet tall and weighed 80 pounds, had AIDS and also had grand mal seizures. She "slump[ed] in her wheelchair, barely able to lift her head." She, like other women who are HIV-positive or had AIDS, was "segregated into special prison yards," had her HIV status disclosed to fellow prisoners, and was "denied certain prison privileges, such as jobs and

³ The Ruiz decision points out numerous examples of discrimination that existed before the enactment of the ADA. Ruiz, *supra* at 1341-1343. Unfortunately, the decisions since Congress enacted the ADA in 1990 demonstrate that such discrimination still exists. As Congress pointed out, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals continue to be a serious and pervasive social problem ...[and] individuals with disabilities are ... subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals...." 42 U.S.C. § 12101(a)(2) & (7).

spousal visits." Nina Siegal, Infected - and Ignored, San Francisco Bay Guardian, Feb. 19, 1997, at 19.

● **Jerome Crowder**, a paraplegic serving a life term, was denied the use of his wheelchair. Being confined to his bed for almost four months, as it did not fit through the cell door, he developed decubitus ulcers. Crowder v. True, 1993 WL 532455 (N.D. Ill. Dec. 21, 1993).

● **Doris Clarkson, Mark Brock, Terryton Harrison and Riis Powell** were Deaf either since early childhood or from birth. All communicate using only American Sign Language (ASL). **Janice Whan, Glennis Robertson and Larry Randall** were hearing-impaired and communicated using ASL, lip reading or hearing aids. Although there were more than 50 inmates in the State's prisons who were Deaf and hard of hearing, "DOCS' Program Services Manual explicitly excludes disabled inmates from 26 academic and vocational programs.... An example of such exclusions is class member **Robertson** who was removed from a drug counseling program ...when correctional staff realized that she could not follow the group's discussions. She was then repeatedly denied access to such a program ... because of her disability." Clarkson v. Coughlin, 898 F.Supp. 1019, 1047 (S.D.N.Y. 1995). As

a result, in part, of **Robertson's** removal from the drug counseling program, she was denied her application for temporary release. Id. at 1031. All of the plaintiffs required a telephone communication device (TDD), a closed-captioned decoder for spoken words on telephone, and visual alarm system for emergencies such as building fires. Prison officials were also aware of prisoners who, because they were Deaf or hearing impaired, were denied participation in DOCS program and activities. Id. at 1028. **Clarkson** received no educational program and could not communicate with the Parole Board staff. Id. at 1029. **Whan** could not hear the fire alarm and could not use the telephone. **Brock** was denied the few programs available to nondisabled inmates "because he is deaf:" he could not participate in an Alcoholics Anonymous program and he "missed morning count because he could not hear the public announcement system." Id. at 1030. **Harrison** was "denied all programming because of his deafness and stayed in his cell twenty-four hours a day. At no DOCS facility was he permitted to participate in a group drug and alcohol rehabilitation program because he had no access to an interpreter." Id. at 1030. **Powell**, despite the sentencing Judge's letter and a presentence report requesting interpreters, was unable to

communicate with other inmates... rendering him isolated, and 'left out'." Id. at 1031.

- Prison officials removed the library from the 1st floor to the basement, making it inaccessible to inmates with disabilities. Robert M. Layne v. Supt. Mass. Corr. Inst. Cedar Junction, 406 Mass. 156, 546 N.E. 2nd 166 (1989).

- A prison system conducts mandatory HIV tests. HIV-positive inmates are segregated from other inmates and the DOC prohibits inmates who test positive from participating in most educational, vocational, rehabilitative, religious, and recreation programs offered in the state prisons. Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997).

- Richard Jackson is paralyzed from the waist down and uses a wheelchair. On Father's Day, he rolled to the visiting room to visit his father. The guard told him "he would have to be taken from his wheelchair for a strip and rectal search before his visit. Jackson, who wears a catheter because he can't control his bladder, refused because the guards had only a toilet seat on which to place him after removing him from the wheelchair. He asked to be taken to a nearby infirmary and searched under proper conditions. The visiting room guard wrote an 'incident report' against him for

disobeying an order, told his dad to leave, and rolled Richard to Isolation in his wheelchair." Dannie M. Martin and Peter Y. Sussman, Committing Journalism, 155-156 (1995).

- Jesus "Jesse" Montez is paralyzed on one side of his body and uses a wheelchair. Because of barriers to access in the prison, he has been "denied a job or access to other programs Mobility-impaired inmates have to rely on other inmates to carry them upstairs.... Jesse has lain on the floor in the shower several times because no one would pick him up."

"Montez was deprived of a wheelchair assistant because two prison employees decided, without any medical evaluation, that Montez should be more self-sufficient...."

"There are no jobs available for disabled inmates, so they can't work.... Then they're classified as idle inmates and so they lose privileges and are sent to facilities used for punitive segregation of inmates who don't work." Sue Lindsay, Paralyzed Inmate Sues State Prisons, Rocky Mountain News, Aug. 11, 1994 at 8A.

- William A. Wall was HIV-positive. Jail officials kept him "isolated in a one-man cell during his incarceration.... He said he was segregated from the remaining inmate populations because of his medical status and was therefore denied access to

programs, services, activities, and privileges ... includ[ing] religious programs, recreation, Alcoholics Anonymous meetings, watching television, library privileges, showers, a larger cell, interaction with other inmates in a cell block and regular removal of trash from his cell." Kim L. Hooper, HIV-Positive Man Agrees To Settlement, The Indianapolis News, Aug. 9, 1997 at W4.

● Timothy Purcell had Tourette's Syndrome. He had uncontrollable twitching, clicking and grunting. He has physical "tics" that "take the form of uncontrollable twitching, clicking and grunting. In some cases the verbal tics take the form of 'coprolalia,' in which [he] exhibits uncontrollable use of foul language." The Superintendent of the Pennsylvania DOC wrote, in response to the prison doctor's recommendation that Purcell be given permission to return to this cell whenever he needed to release his Tourette's tics in private, "'We are not going to allow you to hide behind your Tourette's Syndrome diagnosis.... You have got to learn that you are to follow lawful orders and not 'pick and choose' using Tourette's Syndrome to explain your inability to do what is expected'." Purcell had "allegedly previously been ridiculed and assaulted by inmates and guards who did not understand his condition." Shannon P. Duffy, ADA Applies to Prisoners, The Legal Intelligencer, Jan. 13,

1998, at 3. See Purcell v. Pennsylvania Dept. of Correction, 1998 U.S. Dist. LEXIS 105 (E. D. Pa. Jan. 9, 1998).⁴

● Carmen Jean Harris, Leslie John Pettway and James Hollifield were HIV-positive. The "DOC's policy ... uniformly segregat[ed] from the general prison population those prisoners who test positive" for HIV and are "assigned to one of two segregated HIV wards established by the DOC." Harris v. Thigpen, 941 F.2d 1495, 1498, 1500 (11th Cir. 1991). In addition, DOC had a "blanket exclusion of HIV-positive inmates from general prison population housing, educational, employment, community placement and other programs...." Id. at 1501. They were "categorically separated from virtually all aspects of general population institutional life, e.g., housing assignments, education, employment, recreation, dining, law library use, religious services, family visitation, transportation, sick call and canteen. As a result, they have not been able to participate in most of the programs available

⁴ Amici do not understand how Petitioner believes that Timothy Purcell's case could have "possible fiscal ramifications, and serious operational implications, of applying the ADA to prisoners." Brief of Petitioner at 15, n. 5. All the prison officials have to do is permit Mr. Purcell to return to his cell when he had "tics."

to general population prisoners, while in other cases, the segregated programming provided to them is not comparable." *Id.* at 1521-22.⁵

II. Reasonable Accommodations and Modifications of Prison Programs Exist For Persons With Disabilities In Compliance With the ADA, Demonstrating that With Minimal Effort Prisons Can Comply with the ADA and Not Discriminate Against Persons Because They Are Disabled

Reading Petitioner's and the States' amici curiae brief, one would think that disabled prisoners recently fell from another planet into state prisons and that no one has been able to effectively and reasonably accommodate prisoners who have disabilities. Nothing could be further from the truth.

Some wardens have had no difficulty making reasonable accommodations and modifications of programs. For example, at a Ohio Department of Rehabilitation and Correction facility for adult women, the warden wrote that "most accommodations necessary are

⁵ Petitioner fails to discuss the harsh realities of discrimination against prisoners with disabilities. Rather, their focus is on the alleged interference caused by the ADA on security and administrative concerns of prisons. If the ADA is not enforceable in the prison setting, systemic discrimination will continue to injure persons solely because of their disabilities. There are no other realistic remedies for the types of discrimination that disabled prisoners face. Constitutional claims under the Eighth and Fourteenth Amendment present often insurmountable burdens of proof regarding intent and malice, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986), the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626, places substantial limitations on the power of federal courts to remedy constitutional violations, and immunities preclude relief in a wide variety of contexts. Without the ADA's statutory protection, disabled prisons will be consigned to the kind of discriminatory treatment described above.

very easy and inexpensive to achieve.... Wheelchair ramps are required by law and are more easily achievable in the prison system than anywhere else because of the available labor to build them.... [M]ost accommodations are quite inexpensive." Barbara Brown Nichols, *Sensitizing Staff*, *The Disability Rag & Resource*, Nov.-Dec. 1994 at 21.⁶

A number of ADA complaints have been filed by prisoners with the United States Department of Justice's Disability Rights Section ("DOJ") that have resulted in settlements. Each settlement demonstrates that the ADA's requirements for reasonable accommodations and modifications of policies and programs are very doable in the prison context and do not present an undue administrative or financial burden. For example, a young man who is Deaf was denied a sign language interpreter or other means of effective communication during counseling sessions and was denied an interpreter for a disciplinary hearing. His mother, who has a mobility impairment, could not see her son, other than going down

⁶ This same warden wrote that "[j]ust ten years ago I saw a Deaf inmate wearing a sign saying 'DEAF MUTE.'" He was forced to wear the sign to avoid being disciplined for not responding to and obeying the correctional officers. Now prisons in Ohio provide Deaf inmates with closed captioned televisions, TDDs and licensed interpreters.... The biggest and best step was the simplest: learning to ask what accommodations are needed, then providing all reasonable requests. Barbara Brown Nichols, *supra* at 23.

two flights of stairs. She was denied access to an elevator located in the inmates' area. Prison officials entered a Settlement Agreement with DOJ agreeing to provide qualified interpreters and

"to afford ...an inmate an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity conducted by the Prison...[including] disciplinary hearings, individual and group counseling sessions, classes, and medical appointments... The Prison will give primary consideration to the requests of the inmates ... in determining what type of auxiliary aid or service is necessary..., [and] the Prison shall insure that the elevator leading to the visiting area is made readily available for the use of visitors with mobility impairments at all times that visitors are permitted in the facility."

Settlement Agreement Between the United States of America and the Prison of Chester County, Pa., Dept. of Justice Complaint Number 204-62-70 (Sept. 12, 1996).

Another example of a reasonable accommodation also involved a Deaf man who filed a complaint alleging the prison refused to provide him with a telecommunications device for the Deaf (TDD) that he requested to make outgoing telephone calls. Prison officials entered a Settlement Agreement with DOJ, agreeing to purchase and "to make the TDD's available to inmates and visitors in such manner as to make telephone communication as readily available to individuals with hearing impairments as such

communication is available to others without hearing impairments." Settlement Agreement Between the United States of America and the Lackawanna County Sheriff's Department, Lackawanna County, Pa., Dept. of Justice Complaint Number 204-62-47 (Jan. 25, 1996).

In another DOJ Settlement Agreement, to correct inaccessibility for persons with mobility impairments, the prison hired an architect who identified barriers to access that the prison agreed would be removed over the next few years. These barriers included adjusting door closets, providing telephones with volume control, replacing hardware on sanitary napkin dispensers, providing new 36" wide doors and frames, and modifying toilet stalls to accommodate a wheelchair. Settlement Agreement Between the United States of America and Autogamy County, Wisc., Dept. of Justice Complaint No. 204-85-40 (July 3, 1997).

In yet another DOJ Settlement Agreement, a prison agreed to house disabled inmates in a "regular inmate housing area, not [segregate them in] areas designated for inmates with 'special needs,' if regular housing is otherwise appropriate and requires no more than reasonable modification to housing conditions." Settlement Agreement Between the United States of America and the Wood

County Sheriff's Department, Bowling Green, Ohio, Dept. of Justice
Complaint No. 204-57-100 (June 5, 1997).

The American Correctional Association has recognized that people with disabilities are part of the prison population and can be reasonably accommodated without undue administrative and financial burdens on prison officials. "The good news is that more often than not, ingenuity, imagination and professionalism will go further toward solving the problem [of prisoners with disabilities] than money.... After all, the problem is not a new one; all that's new is the amount of attention it is receiving." Herbert A. Rosefield, Issues to Consider in Meeting Handicapped Offenders' Needs, Corrections Today, Oct. 1992 at 110.

With regards to custody and security problems, the common sense suggestion was made that prison "[o]fficers should be taught how to properly strip search a wheelchair-bound paraplegic, disassemble wheelchairs and prostheses, and otherwise conduct a proper shakedown.... Questions will arise concerning requirements for leg cuffs on paraplegics, waist chains across colostomy bags and even handcuffs for those on crutches. Custody should consult medical personnel when making these decisions." *Id.* at 111. Regarding programs, it was pointed out that "[w]hile finding

appropriate jobs may be difficult, handicapped inmates frequently prove to be excellent workers. All too often no attempt has been made to put these inmates to work, and they have been forced to sit back and watch other inmates earn incentive wages and days off their sentences without an opportunity to do likewise. Education and recreation also must be tailored for disabled inmates' needs and interests. This may mean anything from installing a ramp in the education building to organizing a one-on-one wheelchair basketball contest." *Id.* at 112.

Since Robert Yeskey, the Respondent in the instant case, Yeskey v. Commonwealth of Pennsylvania Department of Corrections, 118 F.3d 168 (3d Cir. 1997), was denied access to Pennsylvania's boot camp, based on an apparent blanket exclusion, it is interesting to hear how other authorities have made reasonable accommodations and modifications to their boot camps.

"Some correctional administrators are examining their boot camp programs and modifying their 'hard labor' provisions to incorporate activities that are within the physical or mental capabilities of inmates who have a disability. Inmates who have a physical impairment could be required to do comparable work involving mental tasks, such as recording readings of books for the visually impaired, typing materials in braille, helping to maintain and beautify grounds, and folding newsletters or stuffing envelopes (without addresses) for the agency... South Carolina has a modified community work

release program for older offenders and those with disabilities.... Participants... must meet all eligibility requirements of the regular work release program with the exception of health status. They must be able to work, but they do not have to be considered 'able bodied'."

Joann B. Morton and Judy C. Anderson, Implementing the Americans with Disabilities Act for Inmates, Corrections Today, Oct. 1996 at 88. None of these accommodations are undue administrative or financial burdens.

A DOJ's National Institute of Justice publication correctly noted that the ADA did not require any public entity to institute accommodations or to modify its policies or programs if the changes would amount to either a fundamental alteration or an undue financial and administrative burden. "Fundamental alteration of a program may occur when the modification is such that it changes the very nature of the program so that the facility would, in effect, be offering a different kind of program. For example, if a prison offers courses for college credit that require certain prerequisite courses not offered on the premises, the facility would not be required to offer them to inmates with disabilities who had not taken these prerequisite courses. To require the facility to offer such prerequisites would, in effect, require it to offer a completely different course." Paula N. Rubin and Susan W. McCampbell, The Americans With Disabilities

Act and Criminal Justice: Providing Inmate Services, Research in Action, July 1994 at 2.

Despite Petitioner's and State amici's attempts to portray reasonable accommodation in prisons as sui generis, the same criteria used to analyze whether an accommodation is reasonable in schools, welfare offices, housing programs, streets, or in the public entity's other programs, also apply to prisons. For example,

"[a]chieving program accessibility [in prisons] may mean relocating services and activities from an inaccessible site to one that is accessible, redesigning equipment, providing auxiliary aids for disabled beneficiaries of city correctional programs, and altering an existing structure....The type of auxiliary aid or service necessary to ensure effective communication will vary depending on the length and complexity of the communication involved. In routine matters, for example, the exchange of written notes with a deaf prisoner may be sufficient. However, where communication is more complex, extensive, or significant - for example, during classes, counseling sessions, or disciplinary proceedings - a qualified sign language interpreter may be required." Id. at 3.

Even those issues unique to prison can be easily dealt with.

For example, classifications decisions in prisons

"should be based solely upon risk factors shown to be relevant to the particular facility where the inmate is incarcerated [and not on a statewide or even necessarily prison-wide basis]. Some factors that might be considered include current criminal charges(s), past criminal charges, incidents of escape or attempted escape, and past institutional

behavior.... While it may be appropriate to place inmates using wheelchairs in first floor locations so they can be evacuated safely in the event of fire, these locations should be scattered among the various first floor housing units to the extent possible. If an inmate's disability is a factor in making a housing decision, this decision should be handled during the override phase of the classification process because inmates with disabilities are not routinely housed separately; rather, they are considered on a case-by-case basis. In other words, the same classification process should apply to inmates with disabilities and inmates without disability.... Valid reasons for segregating inmates with disabilities include the determination that a particular inmate poses a direct threat to the safety of others or has requested to be segregated. It is important that the justification for an override be based on objective information, not mere speculation." *Id.* at 4-6.

It is ironic that the Petitioner objects to the instant Third Circuit decision in Yeskey, because the Pennsylvania Department of Corrections entered into a comprehensive settlement under the Rehabilitation Act of 1973, 29 U.S.C. § 794, the ADA's predecessor, where the parties agreed to

"eliminate or, at least, minimize unlawful discrimination against HIV-infected individuals... The DOC has agreed that, as a general rule, HIV-infected individuals will be precluded from a work assignment only if the individual poses a direct medical threat to the health of others. Although negative reactions of DOC employees or other inmates generally will not be a sufficient ground to justify restrictions on the employment of HIV-positive individuals, on occasion, the DOC may

reassign or transfer an HIV-positive individual for security reasons."

Austin v. Pennsylvania Dept. of Corrections, 876 F.Supp. 1437, 1453 (E.D.Pa. 1995). Such reasonable modifications of policies demonstrate the ADA's flexibility.

Common sense is a large part of all reasonable accommodations. As the Los Angeles Times Editorial stated in response to a federal judge's ruling:

"The ruling ... will equalize conditions for disabled prisoners, ensuring that they will be subject to conditions no worse than those for all other prisoners.

"Surely there are solutions - assuming both sides want them and not to just score ideological points - that would allow disabled inmates to have the same rights as other inmates without costing needless taxpayer dollars.

"One example might be clustering inmates with a particular disability at a prison with appropriate facilities. Some accommodations such as making strobe light alarms available for the inmates, could be relatively easy to put in place. But many problems can be foreseen: As the prison population ages, more and more disabilities can be expected.

"This is an issue that will not go away. Disabled prisoners should be treated no better, but no worse, than other prisoners." Obey Law, and Common Sense, The Los Angeles Times Editorials, Sept. 24, 1996 at B6.

CONCLUSION

The ADA is the federal civil rights statute intended to end discrimination against all disabled persons, regardless of the institutions in which they are placed or reside. If this Court were to hold the ADA does not to apply in prisons, people with disabilities would be the only minority whose civil rights - unlike civil rights based on race, sex or religion - are "park[ed] at the prison gates." Crawford v. Indiana Dept. of Correction, 115 F.3d 481, 486 (7th Cir. 1997)(Posner, CJ.). Disabled prisoners will continue to be discriminated against and devalued because they are disabled. Your amici seek accommodations which will allow disabled prisoners to function equally to nondisabled prisoners.

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